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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**

12 FREE SPEECH SYSTEMS, LLC,
13

14 Plaintiff,

15 v.

16 PETER MENZEL,
17

18 Defendant.
19

Case No. 3:19-cv-00711-WHO

Honorable William H. Orrick Presiding

**PETER MENZEL'S OPPOSITION
TO PLAINTIFF'S MOTION TO
STRIKE AFFIRMATIVE DEFENSES**

Date: June 12, 2019

Time: 2:00 p.m.

1 **II. ARGUMENT**

2 **A. Legal standard**

3 A court may strike an affirmative defense under Fed. R. Civ. P. 12(f), but
 4 “such motions are generally disfavored because the motions may be used as delaying
 5 tactics and because of the strong public policy favoring resolution on the merits.”
 6 *Hartford Underwriters Ins. Co. v. Kraus USA, Inc.*, 313 F.R.D. 572, 575 (N.D. Cal.
 7 2016). Affirmative defenses should only be stricken under 12(f) to avoid spending
 8 time and money litigating irrelevant issues. *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524,
 9 1527 (9th Cir.1993), *reversed on other grounds*, 510 U.S. 517, 114 S.Ct. 1023, 127
 10 L.Ed.2d 455 (1994). “With a motion to strike, just as with a motion to dismiss, the
 11 court should view the pleading in the light most favorable to the nonmoving party.”
 12 *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352 F.Supp.2d 1048, 1057 (N.D.Cal.2004). If a
 13 court strikes an affirmative defense, it should freely give leave to amend provided
 14 that such leave would not prejudice the moving party. *Wyshak v. City Nat’l Bank*, 607
 15 F.2d 824, 826 (9th Cir.1979).

16 **B. Each of Mr. Menzel’s affirmative defenses is applicable and sufficiently** 17 **pled.**

18 Mr. Menzel raised a series of affirmative defenses to the declaratory relief
 19 claims that InfoWars filed in this action. Each of the defenses discussed below is
 20 applicable to this matter and sufficiently pled.

21 **1. Defense: Acted in Good Faith**

22 Mr. Menzel has a good faith basis for his copyright infringement claims, so his
 23 communication of those claims to InfoWars was justified. Mr. Menzel owns nine
 24 copyrighted photographs that were displayed on InfoWars’ website without his
 25 knowledge or permission. That InfoWars responded to Mr. Menzel’s preliminary
 26 communications concerning that infringement with baseless legal argument and a
 27 declaratory relief action did not taint Mr. Menzel’s properly motivated behavior.

1 Such motivations would still serve as a mitigating factor in an attorney fee
2 determination even if InfoWars were to obtain declaratory relief as to Mr. Menzel's
3 copyright infringement claims. Mr. Menzel's motivation in communicating his
4 claims to InfoWars is still relevant even if this defense is stricken, so eliminating it
5 will save neither time nor litigation costs.

6 **2. Defense: Unclean Hands**

7 InfoWars, a sophisticated media company, claims to have reposted an article
8 which included nine of Mr. Menzel's copyrighted photographs. InfoWars did so
9 without authorization from Mr. Menzel. This behavior amounts to unclean hands and
10 could serve as a mitigating factor at least as to an attorney fee determination if
11 InfoWars obtains declaratory relief. InfoWars' culpability – in addition to its possible
12 liability – is relevant to an attorney fee determination in this action even if this
13 defense is stricken.

14 **3. Defense: Failure to Mitigate**

15 InfoWars posted an article which included nine of Mr. Menzel's copyrighted
16 photographs. InfoWars did so without obtaining or even seeking authorization from
17 Mr. Menzel. Once Mr. Menzel notified InfoWars of its alleged infringement,
18 InfoWars could have continued to communicate with Mr. Menzel about a potential
19 resolution of his claims against it, but it instead filed the instant action. InfoWars
20 failure to seek and obtain authorization to display the Subject Photographs, reposting
21 of the infringing article, and election to file the instant action caused whatever
22 economic losses it stands to suffer here. As such it failed to mitigate its losses by
23 failing to seek and obtain authorization to use the Subject Photographs, and by filing
24 the instant action when more pertinent and cost-effective alternatives were available
25 to it. InfoWars characterizes this defense as effectively subsumed within Mr.
26 Menzel's "Attorneys' Fee Improper" defense, so eliminating this defense will not
27 save either party any time or money in this action.

4. Defense: Contributory/Comparative Negligence and Assumption of Risk

InfoWars seeks to recover its costs and fees in this action, but those costs and fees will only be incurred because InfoWars negligently displayed copyrighted images on its website without obtaining or even seeking authorization from the rightsholder and elected to file the instant action. Even if InfoWars obtains declaratory relief, its negligence may be a factor in an attorney fee determination.

5. Defense: Acts of Third Parties

InfoWars claims that it merely reposted the infringing article that was originally published on a third-party website. As such, to the extent that InfoWars has suffered any harm, or incurs any fees or costs, that harm and monetary loss is at least in part attributable to the acts of whomever published the original infringing article – not to Mr. Menzel. Accordingly, this defense is applicable.

6. Defense: Acts and Omissions

InfoWars posted an article which included nine of Mr. Menzel’s copyrighted photographs. InfoWars did so without obtaining or even seeking authorization from Mr. Menzel. These are acts and omissions that InfoWars either took or failed to take which directly lead to this litigation, and these acts and omissions could serve as mitigating factors at least as to an attorney fee determination if InfoWars obtains declaratory relief. InfoWars characterizes this defense as effectively subsumed within Mr. Menzel’s “Failure to State a Claim” defense, so eliminating this defense will not save either party any time or money in this action.

7. Defense: Consent

InfoWars posted an article which included nine of Mr. Menzel’s copyrighted photographs. InfoWars did so without obtaining or even seeking authorization from Mr. Menzel. By displaying multiple copyrighted works on its website without seeking authorization to do so, InfoWars effectively consented to the assertion of

1 copyright infringement claims by the lawful rightsholder to those works. InfoWars
2 characterizes this defense as effectively subsumed within Mr. Menzel's "Failure to
3 State a Claim" defense, so eliminating this defense will not save either party any time
4 or money in this action.

5 **8. Defense: No Wrongful Act**

6 It was not unlawful, unfair, or inequitable for Mr. Menzel to communicate his
7 copyright infringement allegations to InfoWars. Mr. Menzel owns nine copyrighted
8 photographs that were displayed on InfoWars' website without his knowledge or
9 permission. That InfoWars responded to Mr. Menzel's preliminary communications
10 concerning that infringement with baseless legal argument and a declaratory relief
11 action did not taint Mr. Menzel's lawful, equitable behavior. Mr. Menzel's proper
12 and equitable motivation in raising his copyright infringement allegations with
13 InfoWars could serve as a mitigating factor in an attorney fee determination if
14 InfoWars obtains declaratory relief.

15 **9. Defense: Lack of Injury or Damages**

16 InfoWars posted an article which included nine of Mr. Menzel's copyrighted
17 photographs. InfoWars did so without obtaining or even seeking authorization from
18 Mr. Menzel. Once Mr. Menzel notified InfoWars of its alleged infringement,
19 InfoWars could have continued to communicate with Mr. Menzel about a potential
20 resolution of his claims against it, but it instead filed the instant action. To the extent
21 that InfoWars has or will suffer any economic harm in relation to Mr. Menzel's
22 copyright infringement claims, that harm is neither an injury nor damages suffered as
23 a result of Mr. Menzel's infringement allegations, but a cost incurred due to
24 InfoWars' own actions and decisions. InfoWars characterizes this defense as
25 effectively subsumed within Mr. Menzel's "Attorneys' Fee Improper" defense, so
26 eliminating this defense will not save either party any time or money in this action.

27 **10. Defense: Unjust Enrichment**

1 InfoWars posted an article which included nine of Mr. Menzel's copyrighted
 2 photographs. InfoWars did so without authorization from Mr. Menzel. These facts
 3 reasonably cannot be disputed, yet InfoWars seeks a judgment stating that it did not
 4 infringe Mr. Menzel's copyrights, and seeks its costs and fees in this action. If
 5 InfoWars obtains the declaratory relief it seeks, and is awarded costs and fees in this
 6 action, it will be unjustly enriched because even if its unauthorized display of nine
 7 copyrighted images without authorization is not deemed copyright infringement for
 8 instance because the image files were supposedly hosted by a third-party server, it is
 9 still inequitable behavior that should not be rewarded with a reimbursement of fees.

10 **III. CONCLUSION**

11 Each of Mr. Menzel's affirmative defenses discussed above is applicable and
 12 sufficiently pled. While certain of the defenses may be duplicative of others, none of
 13 the challenged defenses will cause the parties to spend any time or money litigating
 14 irrelevant issues, and striking those defenses will not aid either party or this Court.
 15 The motion to strike should be denied.

16
 17 Respectfully submitted,

18 Dated: May 13, 2019

19 By: /s/ Justin M. Gomes
 20 Scott Alan Burroughs, Esq.
 21 Justin M. Gomes, Esq.
 22 DONIGER / BURROUGHS
 23 Attorneys for Defendant-
 24 Counterclaimant
 25 PETER MENZEL
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